INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	4
Argument	8
Conclusion	14

TABLE OF CITATIONS

Cases:	
California Oregon Power Co., 13 FPC 1	4
California Oregon Power Co., 15 FPC 14	4
California Oregon Power Co. v. *Federal Power Commission*, 239 F. 2d 426	4
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492	12
Federal Power Commission v. *Oregon*, 349 U.S. 435	13
First Iowa Hydro-Electric Coop. v. *Federal Power Commission*, 328 U.S. 152	13
National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350	13
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U.S. 635	12
Sunray Mid-Continent Oil Co. v. *Federai Power Commission*, 364 U.S. 137	12

757-210—64——1

Cases—Continued
Wisconsin v. *Federal Power Commission*, 373 U.S. 294 ..... Page 12
Statutes and Regulations:
Federal Power Act, Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791a–825r 3, 8
Section 10(a), 16 U.S.C. 803(a) 9
Section 313(b), 16 U.S.C. 825*l*(b) 12

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 659

PACIFIC POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 508, Dept. Pet. App. pp. 2A–20A) is reported at 333 F. 2d 689. The order (Opinion 381) of the Federal Power Commission (R. 397, *id.* pp. 21A–38A) is reported at 29 FPC 478, and its order on rehearing (Opinion 381A, R. 436, *id.* pp. 54A–80A) at 30 FPC 499. The Commission Examiner's initial de-

cision (R. 381, *id.* pp. 39A–53A) is reported at 30 FPC 499.

JURISDICTION

The decree of the court of appeals was filed on June 8, 1964 (R. 522). Timely petitions for rehearing filed by the Department of Fish and Game of the State of California and Pacific Power & Light Company were denied August 6, 1964 (R. 523). On October 26, 1964, Mr. Justice Douglas extended Pacific's time to file a petition for certiorari to and including November 9, 1964. Petitions for writs of certiorari were filed on November 2, 1964, and November 7, 1964, by the Department and Pacific, respectively. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

The Federal Power Commission issued an order requiring Pacific, a hydro-electric licensee, to construct certain fishery facilities to be operated by the California Department of Fish and Wildlife and to reimburse the State for 80% of the costs of operating those facilities. The court of appeals generally affirmed the order, but remanded the case to the Commission to resolve an ambiguity in the reimbursment requirement and to consider what weight should be given to an agreement between Pacific and the Department settling litigation brought by the Department concerning Pa-

cific's operation of its project. The Department contends (a) that the court misconstrued the terms of the agreement and (b) that the Commission is required by the Federal Power Act to impose upon the licensee 100% of the costs of maintaining the fishery facilities, rather than merely 80%. Pacific has filed a conditional cross-petition urging (a) that the Department's contentions are not ripe for review and (b) that the Commission erred in imposing any reimbursement obligation upon Pacific.

In our view the basic question presented is:

Whether, in view of the court's remand, the issues raised by the Department are premature.

If, contrary to our view, the above question were answered in the negative, the following questions would be presented:

1. Whether, under the Federal Power Act, the Commission must require every hydro-electric licensee to construct all facilities for desirable development of the waterway and to defray all continuing costs of their operation and maintenance, regardless of the circumstances and equities of the particular case.

2. Whether the court misconstrued the settlement agreement between Pacific and the Department.

3. Whether the Commission's imposition of reimbursement obligations upon Pacific was warranted.

4. Whether the court erred in concluding that the Commission's reimbursement requirement was ambiguous and should be clarified upon remand.

STATEMENT

In 1954, after a history of administrative proceedings, the Commission ruled that seven plants maintained by Pacific Power and Light Company (Pacific)[1] on the Link and Klamath Rivers in Oregon and Califronia constituted a hydro-electric project for which an F.P.C. license was required. *California Oregon Power Co.*, Project No. 2082, Opinions Nos. 266 and 266–A, 13 FPC 1 and 15 FPC 14. Pacific conceded the Commission's licensing jurisdiction on the grounds that the project was located on navigable waters of the United States and occupied federal government land.[2]

Among the plants comprising the project were two dams, Copco No. 1 and Copco No. 2, constructed in 1918 and 1925 on the Klamath River, which is a major area for sports fishing for anadromous fish. Pacific's operation of these developments as peaking plants resulted in sudden and extreme fluctuations of the river downstream, from no flow at all to unusually high flow, with resultant danger to human life and serious detriment to the anadromous fish, many of which

[1] Although Pacific did not acquire this project until 1961, the succession of title is not relevant to the issues raised here. Accordingly, we shall use "Pacific" to include its predecessors in interest.

[2] The Court of Appeals for the District of Columbia dismissed for lack of aggrievement Pacific's petition to review the Commission's additional ruling that it had jurisdiction because the project used surplus water from a government dam. *California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426.

became stranded and died in the periods when the Copco plants were not generating.

Pacific could rectify this condition in one of two ways: (1) by ceasing to operate the Copco plants for peaking purposes; or (2) by constructing a re-regulating dam downstream. Pacific chose the latter alternative and applied to the Commission for a license authorizing construction of the Iron Gate development, which would serve to re-regulate the flow of the river and also generate electric energy. This method of correcting the situation was satisfactory to the California Department of Fish and Game ("the Department"); and, on the basis of the proposed development, litigation instituted by the Department against Pacific in the State courts was settled in 1959.

While it satisfactorily smoothed out the fluctuations of the Klamath River, the Iron Gate dam necessarily eliminated some 16 miles of anadromous fish spawning grounds on the Klamath River upstream to Copco No. 2, and on its tributaries in that stretch. Accordingly, when the Commission issued a license for Iron Gate, it included conditions under which facilities for fish protecton would be provided. As finally issued and amended, the license contained two articles concerning fish facilities: Article 49, relating to hatcheries, and Article 50, dealing with trapping, egg collecting and related facilities (herein referred

to as egg-taking facilities). These articles read as follows (R. 401):

> *Article 49.* The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.
>
> *Article 50.* The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Pacific built the Article 50 egg-taking facilities as part of the original construction of the Iron Gate development, and they were put into operation by the Department in January, 1962 (R. 384).

In August, 1961, the Department petitioned the Commission for an order implementing Article 49. After hearing, the Commission ordered Pacific to construct hatchery facilities in accordance with plans

which all parties had stipulated to be appropriate if any hatchery facilities were required (R. 411, 378–380). In addition, it required that Pacific reimburse the Department for 80% of the costs of operating the hatchery and also the egg-taking facilities already constructed (R. 411–412).

Pacific and the Department each petitioned for review; Pacific challenged the requirement that it build a hatchery and reimburse the Department for 80% of operating costs, while the Department claimed that it was entitled to reimbursement for 100%, rather than merely 80%, of those costs. The Ninth Circuit sustained the requirements that Pacific build a hatchery and defray 80% of the costs of its operation. It ruled, however, that the Commission had not made clear whether Pacific was to reimburse the Department (1) for all such costs up to 80% of the costs for operation at full capacity, or (2) for 80% of the Department's actual costs if it operated at less than full capacity. Although the court "presumed" that the Commission intended alternative (1), it left the Commission free, on remand, to provide "such clarification * * * as it may desire." Dept. Pet. App. pp. 17A–20A.

With respect to the costs of maintaining and operating the egg-taking facilities, the court held that the agreement by which the Department and Pacific settled their State court litigation relieved Pacific of the obligation to make any reimbursement, and that the Commission, while not bound by the contract, could disregard it and impose such an obligation "only if it found upon sufficient evidence that there are sound

reasons for doing so" (Dept. Pet. App. pp. 15A–16A). The court remanded the case for further findings, with or without additional evidence, on that issue (Dept. Pet. App. p. 19A).

ARGUMENT

1. The Department's principal contention is that the court below erred in holding that the Commission was not required by the Federal Power Act to impose upon Pacific the entire cost of operating and maintaining the fishery facilities, rather than merely 80% of those expenses. It further suggests that the court misconstrued the settlement agreement between Pacific and the Department when it concluded that the agreement obligated the State to bear the operating costs of the egg-taking facilities (Dept. Pet. pp. 4, 21). In its "conditional cross-petition," Pacific has pointed out (Pac. Pet. p. 7) that these issues "will not be finally determined until further deliberations have been had by the Commission." We agree.

In the remand proceedings ordered by the court below, the Commission may conclude that there are sound reasons for requiring Pacific to bear the expenses of the egg-taking facilities notwithstanding its settlement agreement with the State. In that event, the court's interpretation of the agreement would cease to be an issue.[3] Moreover, the question of the Commission's discretion to burden Pacific with something less than the entire costs of operating and main-

[3] The Commission itself did not undertake to construe that agreement, holding that the agreement was not decisive as to obligations defined by Commission order under the Federal Power Act.

taining the fishery facilities cannot meaningfully be reviewed until the ambiguity in the Commission's order noted by the court below (*supra*, p. 7), has been resolved by a clarifying order. We submit, therefore, that neither of the issues tendered by the Department is presently ripe for consideration by this Court.

2. In any event, the present case involves a unique factual situation and neither the Commission's order nor the court's decision was based on any principle of general applicability. The court was clearly correct in rejecting the proposition that the Commission must require every power licensee to construct all facilities for desirable development of the waterway and to defray all continuing costs of operation and maintenance, regardless of the circumstances and equities of the particular case. Such a view, carried to its logical conclusion, would mean that an application for an FPC license must be denied unless the applicant is willing to construct and maintain flood control, navigation, recreation and/or other facilities, even if the costs involved might exceed by many times the advantages of the power project. Adoption of the Department's all-or-nothing approach would frustrate any private development whatsoever in circumstances where a potential power development could not economically support all facilities necessary for optimum development of the waterway. Congress intended no such self-defeating result when, in Section 10(a) of the Act, it provided for licensing of power projects "best adapted to a comprehensive plan

for improving or developing a waterway or waterways."

Given, therefore, that the Commission has wide discretion to determine the means for achieving optimum development in light of the factual situation, the only remaining question is whether that discretion was abused here. Plainly it was not. As the recipient of a valuable privilege to use public lands and waters for private gain, Pacific was obligated to preserve the public's natural resources; and indeed one of the principal purposes of the Iron Gate development was to smooth out the fluctuations in the Klamath River, destructive of fish life, which had been caused by Pacific's Copco developments. The Commission noted, however, and the court below agreed (Dept. Pet. App. pp. 18A–19A), that the evidence suggested that, in addition to eliminating the fluctuations produced by the Copco developments, the Iron Gate facilities will also eliminate natural fluctuations and thereby make the river somewhat more congenial to fish life than it would be in its natural state. In these circumstances, the Commission was not unreasonable in concluding that Pacific need not be required to bear all the costs of operating and maintaining the facilities.

Moreover, in view of the fact that the State was permitted to operate the facilities constructed by Pacific and thereby to maintain its traditional control

over the fish life of the river,[4] that the State had historically operated and maintained fish facilities at its own expense (R. 389) and was willing to assume a portion of the maintenance expenses involved here (Dept. Pet. p. 11, fn. 7), and that the State is no less vitally interested than the federal government in the preservation of these recreational resources,[5] it cannot be said that the Commission was arbitrary in limiting Pacific's obligation to 80%.

It should be noted, finally, that if the State assumes 20% of the expense of maintaining and operating the fish facilities, the cost to it will be no more than approximately $10,000 a year (R. 402). Thus, the Department does not, and could not reasonably, contend that this case is in itself of major economic significance.

3. Since Pacific seeks review only on condition that the Department's petition is granted, we shall comment only briefly on its contentions.

---

[4] In answer to inquiries by the court at the oral argument below, counsel for the Department stated unequivocally that the State would not want operation of the fishery facilities turned over to Pacific or to a federal agency, such as the Fish and Wildlife Service of the Department of the Interior. With some justification, one of the judges of the court below suggested that in objecting to the Commission's order the State might well be "looking a gift horse in the mouth."

[5] As the court below said (Dept. Pet. App. p. 11A): "The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire."

First, Pacific's attack upon that part of the Commission's order which pertains to the hatchery facilities [6] goes only to the sufficiency of the evidence and findings; there is no contention that the Commission lacks statutory authority to impose the requirements it did.

Pacific further claims that the court below abridged its rights under the settlement agreement with the Department by holding (a) that under the agreement Pacific was not relieved of any obligation to pay the operating expenses of the hatchery and (b) that despite the State's agreement to pay for maintenance and operation of the egg-taking facility, the Commission might impose that burden on Pacific if it found sound reasons for doing so. The question of contract construction—a question to which the Commission did not address itself in the order—is not of sufficient moment to warrant consideration by this

[6] Pacific's cross-petition for certiorari appears to object not to the requirement that it construct a hatchery, but rather to its being required to "convey" it to the State. But, as the court below properly stated (Pac. Pet. App. pp. 9–10), its present apparent contention that it should operate the hatchery was never made before the Commission and no evidence was presented as to Pacific's willingness or ability to conduct such operation in the public interest. Therefore, the contention may not be considered on judicial review (see Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, 650–651).

Court.[7] And as to the contention that "neither the Court of Appeals nor the Commission is free to set aside Pacific's rights acquired by contract" (Pac. Pet. p. 12), the short answer is that in performing its statutory duties in the public interest, a federal administrative agency is not bound or restricted by the private contracts of parties appearing before it. *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 363. And the rule is no different where one of the parties to the contract is a State, since the Federal Power Act entrusts the protection of the public interest, including that of the citizens of California, to the Federal Power Commission. *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 449; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 182.

Finally, there is no merit to the contention (Pac. Pet. pp. 3, 7, 12–13) that the court below "invited" the Commission to "alter" its order requiring Pacific to reimburse the Department for 80% of the annual cost of operation and maintenance of the fish hatchery, and thereby invaded the Commission's administrative discretion. The court merely asked the Commission to clarify a provision which it believed to be ambiguous. Whether or not this particular provision of this particular order was in fact ambiguous is scarcely a question calling for review by this Court.

[7] If Pacific were correct in its view that the contract relieves it of liability for the expenses of operating the hatchery, the Commission would be confronted with the same question as to the hatchery which now faces it as to egg-taking facilities—whether sound reasons exist for requiring Pacific to pay the operating costs even though the contract imposes that burden on the State.

CONCLUSION

The decision below is not ripe for review and, in any event, the case involves no substantial questions warranting review by this Court.

For these reasons, both petitions should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
JOSEPHINE H. KLEIN,
Attorney,
Federal Power Commission.
Washington, D.C., 20426.

DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964